

Supreme Court, U. S.
FILED

SEP 22 1976

MICHAEL RODAK, JR., CLERK

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1846

CMI CORPORATION,
Petitioner,

VERSUS

LAKELAND CONSTRUCTION Co., INC., and
MILLER FORMLESS Co., INC.,
Respondents.

PETITIONER'S REPLY BRIEF

JERRY J. DUNLAP, of
DUNLAP, CODDING & MCCARTHY
510 Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorney for Petitioner

September, 1976

TABLE OF CONTENTS

	PAGE
Statement	1
Conclusion	3
Certificate of Service follows Brief.	

TABLE OF AUTHORITIES

CASES:

Application of Ornitz, 347 F.2d 586 (CCPA, 1965)	2
Graham v. John Deere Co., 383 U.S. 1 (1966)	2
Intricate Metal Products, Inc. v. Schneider, 324 F.2d 555 (9 Cir. 1963)	2
Triax Company v. Hartman Metal Fabricators, Inc., 479 F.2d 951 (2 Cir. 1973)	2

STATUTES:

35 U.S.C. § 102	2
35 U.S.C. § 103	2

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1846

CMI CORPORATION,
Petitioner,

VERSUS

LAKELAND CONSTRUCTION CO., INC., and
MILLER FORMLESS CO., INC.,
Respondents.

PETITIONER'S REPLY BRIEF

Respondents Lakeland Construction Co., Inc. and Miller Formless Co., Inc. in their BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI have disagreed with Petitioner's interpretation of the findings of the District Court and the Court of Appeals as regards the validity of Petitioner's patent. Respondents insist that the inclusion of Petitioner's own co-pending and prior issued patent among the prior art considered by the District Court in rejecting Petitioner's patent under Section 103 was not error. Petitioner strongly urges in its petition and here that that position is erroneous. It is implicit in the findings (Finding 72, App. 27) that the District Court erroneously included the *disclosure and the claims* of Petitioner's prior patent with the prior art. The District Court discussed the

subject matter of both of Petitioner's patents in connection with the question of obviousness at least four times (Finding 39, App. 21; Finding 60, App. 25; Finding 60, App. 27; Finding 72, App. 27) which lends credence to the Petitioner's position that the District Court improperly included the disclosure of Petitioner's prior patent as prior art in his determination that the patent in suit was obvious.

We submit that even the *claims* of the parent patent should not be considered part of the prior art when considering 35 U.S.C. § 103. Two of the cases cited by Respondents [*Application of Ornitz*, 347 F.2d 586, 590 (CCPA, 1965) and *Intricate Metal Products, Inc. v. Schneider*, 324 F.2d 555, 560 (9 Cir. 1963)] do not hold to the contrary. If the third case cited by Respondents, *Triax Company v. Hartman Metal Fabricators, Inc.*, 479 F.2d 951, 954 (2 Cir. 1973), is construed to hold to the contrary, then we submit it is not consistent with this Court's decision in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). In the *Graham* case, this Court stated that the prior art referred to in Section 103 is the prior art described in Section 102, and there is no way a co-pending application of the same inventor can be found in Section 102.

We further submit that the only way the *claims* of the parent patent can be properly considered is on a question of double patenting as was done in the *Ornitz* and *Intricate Metal Products, Inc.* cases cited by Respondents, with, however, the further consideration of the effect of a terminal disclaimer. As we stated in our brief in support of our Petition, this is a question which should be decided by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JERRY J. DUNLAP, of
DUNLAP, CODDING & MCCARTHY
510 Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorney for Petitioner

September, 1976